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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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MAY 15 1998

In the Matter of

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS
CONCERNING THE CALEA ASSISTANCE CAPABILITY COMPLIANCE DATE**

AirTouch Communications, Inc. ("AirTouch") hereby files the following reply comments in the above-captioned proceeding.

The Communications Act expressly authorizes the Commission to extend the October 25, 1998 CALEA assistance capability deadline "if [it] determines that compliance is not reasonably achievable through application of technology available within the compliance deadline."¹ Carrier and vendor comments demonstrate conclusively that compliance with the current implementation deadline "is not reasonably achievable" for any carrier — because the technology necessary to implement CALEA's requirements does not now exist.² Only the FBI

¹ 47 U.S.C. § 1006(c)(2). Congress established this waiver procedure because it recognized that carriers are dependent on their vendors for CALEA solutions, that manufacturers play "a critical role," and that "[w]ithout their assistance, telecommunications carriers likely could not comply with the capability requirements."). H.R. Rep. No. 103-827 at 26 (1994)("House Report").

² See, e.g., Comments filed by: Aliant Communications ("Aliant"); ALLTEL Communications, Inc. ("ALLTEL"); Association for Local Telecommunications Services ("ALTS"); Ameritech Operating Companies and Ameritech Mobile Communications ("Ameritech"); AT&T Corp. ("AT&T"); Bell Atlantic Mobile, Inc. ("BAM"); BellSouth Corp. ("BellSouth"); Cellular Telecommunications Industry Association ("CTIA"); Centennial Cellular Corp. ("Centennial"); CenturyTel Wireless, Inc. ("CenturyTel"); GTE Service Corp. ("GTE"); ICG Telecom Group, Inc. ("ICG"); Liberty Cellular, Inc. *et al.* ("Liberty *et al.*"); National Telephone Cooperative Association ("NTCA"); Nextel Communications, Inc. ("Nextel"); Northern Telecom, Inc. ("Nortel"); Omnipoint Communications, Inc.

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opposes an extension, claiming that an extension is “not necessary” because industry supposedly has presented “no evidence” that compliance by October 25, 1998 is not reasonably achievable.³

The FBI’s argument is inconsistent with the record evidence. All of AirTouch’s switch vendors — Ericsson, Lucent, Motorola, and Nortel — have advised the Commission that they will be unable to make CALEA-complaint modifications available to AirTouch by October 1998.⁴ What is more, the FBI’s argument is inconsistent with its own representations to Congress and the Commission. For example, in February, 1998, the Attorney General advised Congress that manufacturers will require at least 18 months after the Commission order in this proceeding to build CALEA-compliant equipment.⁵ Similarly, one month earlier, the FBI advised Congress that switch vendors would not even have “partial solutions” available before

² (...continued)
 (“Omnipoint”); Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO”); Paging Network, Inc. (“PageNet”); Personal Communications Industry Association (“PCIA”); Powertel, Inc. (“Powertel”); Rural Cellular Association (“RCA”); SBC Communications, Inc. (“SBC”); Southern Communications Services, Inc. (“Southern”); Telecommunications Industry Association (“TIA”); 360° Communications Company (“360°”); United States Cellular Corp. (“USCC”); United States Telephone Association (“USTA”); and U S WEST, Inc. (“U S WEST”). Similarly, privacy groups support an extension to ensure that privacy rights are fully protected under the law. *See* Comments filed by the Electronic Privacy Information Center (“EPIC”), the Electronic Frontier Foundation (EFF”); Center for Democracy and Technology (“CDT”).

³ Federal Bureau of Investigation and U.S. Department of Justice, Comments Regarding the Commission’s Authority to Extend the October 25, 1998 Compliance Date, CC Docket No. 97-213, at 2 ¶ 4 and 16 ¶ 29 (May 8, 1998)(“FBI Comments”).

⁴ *See, e.g.*, AirTouch Communications and Motorola, Joint Petition for an Extension of the CALEA Assistance Capability Compliance Date (May 5, 1998); AT&T Wireless Services, Lucent Technologies, and Ericsson, Petition for Extension of Compliance Date (March 30, 1998); Nortel Comments, CC Docket No. 97-213 (May 8, 1998).

⁵ *See* Testimony of the Attorney General before the House Appropriates Subcommittee for Commerce, State, Justice, the Judiciary and Related Agencies (Feb. 26, 1998).

October 1998.⁶ Moreover, only last month, the FBI advised the Commission that “the [CALEA] compliance date *should be extended* for a period of 18 months after [its] Order is issued in this proceeding.”⁷ It is thus beyond dispute that compliance with the current October 25, 1998 date “is not reasonably achievable through application of technology available within the compliance deadline.”⁸

The real issue in this proceeding, as the Commission adeptly noted in its April 20 Public Notice, is “how [it] can most quickly and efficiently extend the compliance deadline” in order to “reduce the administrative burden on both the affected parties and the Commission.”⁹

⁶ See FBI and Department of Justice, CALEA Implementation Report to Congress (Jan. 26, 1998). This report refers to a “promising” network solution provided by Bell Emergis. *Id.* at 3 and 11-12. However, even before the FBI prepared its report, Ameritech had concluded following a feasibility study that the Bell Emergis product contained “significant technical problems that would require substantial modification before it could operate with the existing network and be compliant with CALEA.” Ameritech at 7. Notably Bell Emergis, which also supports an extension, admits that its solution is incomplete. See Bell Emergis at 3 (“[C]ertain CALEA functionality can only be provided through a switch-based approach.”).

⁷ Letter from David Yarbrough, FBI, to Magalie Salas, FCC Secretary, CC Docket No. 97-213, at 2 (April 14, 1998)(emphasis added). In this letter the FBI supported an extension only for LECs, cellular carriers, and broadband PCS providers. Inexplicably, the FBI *opposed* an extension for “other telecommunications technologies, including satellite, paging and SMRS communications” *for which it has not identified either its capacity or capability requirements*.

⁸ 47 U.S.C. § 1006(c)(2). Also irrelevant is the FBI’s assertion that the current uncertainty over the industry standard provides no basis upon which to extend the compliance date. FBI Comments at Summary and 6 ¶ 9. The fact is that no CALEA-compliant equipment will be available within the compliance deadline — *whether or not* the equipment complies with the industry standard which the FBI challenges as inadequate. In this regard, it is also irrelevant that carriers have the “freedom to choose” CALEA solutions which do not meet the industry standard (*id.* at 5 ¶ 7) — because no CALEA solutions are available in the market today.

⁹ See Public Notice, “Communications Assistance for Law Enforcement Act, CC Docket No. 97-213,” DA 98-762, at 4 (April 20, 1998)(“Public Notice”).

One option, which the FBI acknowledges is expressly authorized by the statute,¹⁰ is for the Commission to require each carrier to prepare and file a separate request for an extension. Indeed, several carriers, including AirTouch companies, have already filed carrier-specific extension petitions.¹¹ However, requiring each of the thousands of carriers subject to CALEA to prepare and file individual, redundant extension requests which, in turn, would require the Commission to enter thousands of redundant extension orders would hardly “reduce the administrative burden on both affected parties and the Commission.”¹² In this regard, even the FBI has noted that “duplication of effort and expense is inconsistent with the spirit and purposes of CALEA.”¹³

A second alternative, as the Commission has recognized, would be to issue an extension order that “applies to all carriers subject to the compliance deadline, to ensure that the objectives and obligations of CALEA are met in the most timely manner.”¹⁴ AirTouch and other

¹⁰ The FBI does not challenge the Commission’s express statutory authority to grant extensions to individual carriers, although it “downplays” the availability of this statutory relief. *See, e.g.*, FBI Comments at 1 ¶ 2 (“Congress . . . enacted a series of provisions designed to grant temporary relief to individual industry participants in appropriate circumstances”); and at 8 ¶ 14 (“Congress authorized the Commission . . . to grant carrier-specific extensions of the compliance date . . .”).

¹¹ *See, e.g.*, AirTouch Communications and Motorola, Joint Petition for an Extension of the CALEA Assistance Capability Compliance Date (May 5, 1998); and AirTouch Paging Services, Petition for an Extension of the CALEA Capability Compliance Date (May 4, 1998).

¹² *Public Notice* at 4.

¹³ FBI Reply Comments, CC Docket No. 97-213, at 5-6 ¶ 7 (Feb. 11, 1998).

¹⁴ *Public Notice* at 4.

commenters have documented that the Commission has authority under both CALEA and the Communications Act generally to enter “blanket,” or industry-wide relief.¹⁵

The FBI takes a contrary position. According to the FBI, although “duplication of effort and expense is inconsistent with the spirit and purposes of CALEA,” and although the Commission has express statutory authority to grant thousands of extension orders, the Commission lacks authority to grant one industry-wide extension order.¹⁶ This position is remarkable, given that the FBI recommended only one month ago that the Commission enter a blanket extension for numerous carriers.¹⁷ However, even more remarkable is the FBI’s position that, while the Commission supposedly lacks statutory authority to enter one extension order (as opposed to thousands of orders), the FBI claims to possess the extra-statutory authority to enter the same, blanket relief.

The FBI appears to argue that there is no need for the Commission to grant any extension requests because *it* can provide the same relief in the form of “federal enforcement forbearance agreements.”¹⁸ Under these agreements, “the Department of Justice will assure

¹⁵ See, e.g., AirTouch at 7-9; AT&T at 5-7; BAM at 4-6; CTIA at 12-16; PCIA at 11-14; and TIA at 5-9.

¹⁶ According to the FBI, grant of one extension order, as opposed to thousands of extension orders, would be “fundamentally contrary to the clear intent of Congress as expressed in the language and structure of the Act.” FBI Comments at 11 ¶ 21. The FBI would therefore have the Commission believe that Congress expects it to engage in the senseless procedure of requiring the preparation and consideration of thousands of redundant petitions.

¹⁷ See Letter from David Yarbrough, FBI, to Magalie Salas, FCC Secretary, CC Docket No. 97-213, at 2 (April 14, 1998) (“The Joint Petitioner’s [*sic*] reiterated their position, as stated in their petition, that the compliance date should be extended for a period of 18 months after the Commission’s Order is issued in this proceeding.”).

¹⁸ See FBI Comments at 19 ¶ 33 (“This mechanism of forbearance agreements should make
(continued...)”)

manufacturers and carriers that they will not be subject to federal enforcement actions under § 108, in return for [their] assurance that they will develop and use equipment meeting the assistance capability requirements of § 103 in an agreed-up, reasonable time.”¹⁹ Moreover, the FBI asserts that it will enter forbearance agreements on “a platform-by-platform (or solution-by-solution) basis” that, according to the FBI, will offer “a pragmatic and sensible method for ensuring that the industry and law enforcement are able to get CALEA implemented as quickly as is reasonable and fair for all involved.”²⁰

The FBI’s forbearance agreement proposal is neither “practical” nor CALEA-mandated, as the FBI suggests.²¹ It is not practical because, as even the FBI concedes, unlike a Commission extension order, a “federal agreement” does not protect carriers from enforcement actions filed by state law enforcement agencies.²² More fundamentally, the FBI’s alternative procedure is inconsistent with CALEA itself. Congress expressly placed authority to grant extensions in the *Commission* rather than the FBI. Congress also expressly placed authority in the *Commission* rather than the FBI to determine the scope of the assistance capability requirement (to ensure that privacy and other interests are properly considered).²³ Finally,

¹⁸ (...continued)
unnecessary any wave of extension petitions to the Commission.”).

¹⁹ *Id.* at 17 ¶ 31.

²⁰ *Id.* at 19 ¶ 33.

²¹ *Id.* at 17 ¶ 31.

²² *See id.* at 17 n.3.

²³ It is AirTouch’s understanding that, as part of its forbearance agreement procedure, the FBI is attempting to convince manufacturers to provide capabilities which carriers do not agree are required by CALEA — thereby bypassing completely the Congressional
(continued...)

Congress made clear that “public accountability” was to be the hallmark of CALEA, stating that “*all* proceedings before the FCC will be subject to public scrutiny, as well as congressional oversight and judicial review.”²⁴ There will be no public accountability in the FBI’s proposed forbearance agreement proposal.²⁵ Again, it is *this* proposal which has no statutory basis in CALEA.

As the FBI acknowledges, the Commission has express statutory authority to grant at least individual, carrier-specific extension petitions of the sort filed by AirTouch and other carriers. The Commission should act on these petitions promptly, and there is no basis in CALEA or the Communications Act for the Commission to rely on the deficient and extra-statutory alternative procedure proposed by the FBI.²⁶

The FBI finally claims that “grant of an industry-wide extension,” as opposed to grant of thousands of individual extension requests, “would be disastrous from the perspective of

²³ (...continued)
determination that ultimate control over the scope of the assistance capability requirement rests in the *Commission*. In this regard, AirTouch finds very troubling the suggestion in the FBI filing that the FBI believes carriers may ignore the orders of this Commission. See FBI Comments at 16 ¶ 30 (“The carrier will not be required to remove these capabilities” which the Commission determines are inconsistent with CALEA.”) (emphasis in original).

²⁴ See, e.g., House Report at 14, 20, and 27-28 (emphasis added).

²⁵ Carriers like AirTouch have encountered problems with the FBI’s procedure. Although carriers have the responsibility to deploy CALEA-compliant equipment, it has been difficult to get cost and scheduling data from vendors, although some information has reportedly been made available to the FBI. Again, AirTouch submits that the ongoing vender/FBI procedure threatens to bypass the Congressional determination that these kinds of decisions are to be made by the Commission, with *carrier* involvement.

²⁶ Now is not the time for the Commission to shirk its express statutory responsibility for a procedure which is *not* provided for under CALEA and which even the FBI concedes does not provide full relief.

law enforcement's ability to protect the public from criminal activity."²⁷ This unexplained assertion is not credible on its face. First, Congress expressly permitted a CALEA compliance extension if a certain showing was made; this showing has been made and thus an extension should be granted. More importantly, and as CTIA points out, grant of an industry-wide extension will not mean that electronic surveillance "will come to a standstill" as the FBI suggests:

Granting an extension does not mean that carriers will not have the ability to perform wiretaps during the extension period. All carriers currently provide technical assistance to law enforcement to conduct lawfully authorized wiretaps, whether digital or analogue, wireless or wireline. The vast majority of these wiretaps are carried out without impediment. CALEA solutions will result in *advanced* features being available for wiretapping in addition to the basic surveillance already being conducted.²⁸

Further, even if CALEA solutions were available (and they are not), law enforcement would still be incapable of using the new capabilities. As TIA has noted:

[T]he FBI has not yet identified a contractor to develop the collection equipment necessary for law enforcement to receive and process the information that will be provided under [CALEA]. . . . Thus, even if a carrier were poised to install CALEA-compliant equipment there would be no means for testing the equipment or

²⁷ FBI Comments at 11 ¶ 21. *See also id.* at 19 ¶ 34 (An "industry-wide extension . . . would have severe repercussions for the public interest in effective law enforcement."). To the extent that the FBI is concerned about "[a]ny delay in the effective date of § 103's assistance capability obligations" (*id.*), AirTouch respectfully submits the FBI must take some of the blame. After all, it was the FBI which decided to disregard the statutory directive to publish law enforcement's capacity requirements by October 1995 (and which still has not published capacity requirements for paging and many other carriers). It was the FBI which blocked industry's attempt to publish timely implementing assistance capability technical standards. And it was the FBI which inexplicably waited over two years before filing its deficiency petition, a petition which makes it virtually impossible for industry to determine what is, and is not, required by CALEA.

²⁸ CTIA at 2 (emphasis in original).

even for law enforcement to receive any information once the equipment is installed.²⁹

AirTouch submits that the FBI's claim here must be rejected.

The record evidence conclusively establishes that, for all carriers, compliance with the October 25, 1998 date "is not reasonably achievable through application of technology available within the compliance deadline."³⁰ The only issue is whether the Commission should enter one extension order or thousands of such orders.

For the reasons set forth herein and in its petition and extension filings, AirTouch respectfully requests that the Commission expeditiously enter an order, applicable to all telecommunications carriers and service providers, extending by two years the date by which they must comply with CALEA's assistance capability requirements. If, however, the Commission determines that it cannot grant blanket relief, then AirTouch requests that the Commission grant expeditiously the individual, carrier-specific extension petitions that have been filed — including the petitions submitted by AirTouch Communications and AirTouch Paging. This would enable other carriers using the same equipment to conserve some resources

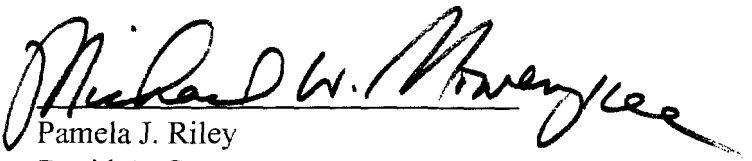
²⁹ TIA at 12-13.

³⁰ 47 U.S.C. § 1006(c)(2).

by submitting simplified "me too" extension petitions. The Commission is empowered — and obligated — to consider and rule on carrier extension requests. AirTouch urges it do so now.

Respectfully submitted,

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May 15, 1998

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I, Jo-Ann G. Monroe, hereby certify that I have on this 15th day of May, 1998 caused a copy of the foregoing Reply Comments to be served by first class U.S. mail, postage prepaid, to the following:

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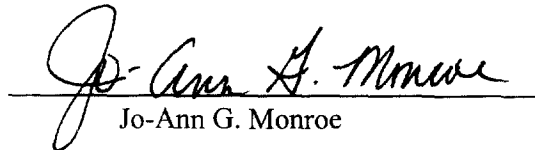
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